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NOV 9 1992
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No. 92-668

In The

Supreme Court of the United States

October Term, 1992

ERWIN & ERWIN, Professional Corporation,

Petitioner,

vs.

SUZAN BREWER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the Ninth Circuit abuse its discretion in imposing a sanction against Erwin & Erwin pursuant to Rule 38 of the Federal Rules of Appellate Procedure for filing a frivolous appeal from the United States District Court's Order of March 8, 1990.

(2) Does this Court have jurisdiction to review the Ninth Circuit opinion in *Brewer v. Erwin & Erwin, P.C.*, 942 F.2d 1462 (9th Cir. 1991).

(3) Was the Ninth Circuit legally correct in holding that the Bankruptcy Court's Order which allowed Erwin & Erwin as insiders of Marquam Investment Corporation an attorney's fee of $120,000 was legally incorrect.

STATEMENT OF THE CASE

Nature of the Claim and Proceedings Below

The appeal to the Ninth Circuit involved an attempt by Erwin & Erwin, P. C. to reinstate a claim of $120,000 for attorney's fees for pre-bankruptcy petition services it claims it intended to charge to Marquam Investment Corporation. The Bankruptcy Court allowed the claim in full. Erwin & Erwin's statement of the case incorrectly states Brewer did not appeal the reasonable value of its services. Pet. for Cert., p. 18. This is wrong. She challenged the entire claim. Lod., pp. 2-4. Brewer appealed to the United States District Court for the District of Oregon, which reversed the Bankruptcy Court and dismissed Erwin & Erwin's claim. Resp. A.1. Erwin & Erwin appealed to the Ninth Circuit, which affirmed the District Court. *Brewer v. Erwin & Erwin, P.C.*, 942 F.2d 1462 (9th Cir. 1991). Following the Ninth Circuit decision, Brewer filed a claim for attorney's fees of $5,058.75 against Erwin & Erwin pursuant to Rule 38 of the Federal Rules of Appellate Procedure, which the Ninth Circuit allowed. *Brewer v. Erwin & Erwin, P. C.*, 959 F.2d 800 (9th Cir. 1992). Erwin & Erwin filed a petition for certiorari on October 13, 1992.

STATEMENT OF RELEVANT FACTS

This case has been ongoing between Brewer and Erwin since April, 1976. Brewer was at one time a tenant in a house which Marquam Investment owned in Portland, Oregon, Warde Erwin and his legal secretary. Lavelle Mullennex own all of the stock of Marquam Investment Corporation. Tr. 52-53 (5-6-85). A dispute

developed between Brewer and Erwin, and she filed claims for damages for intentional infliction of emotional distress and for violations of Oregon's Residential Landlord and Tenant Act, ORS 90.100 et seq. After two trials and two appeals, the Oregon Court of Appeals reinstated a jury verdict in favor of Brewer for $97,880. $75,000 of this verdict was for punitive damages against Marquam only. *Brewer v. Erwin*, 287 Or. 435, 600 P.2d 398 (1979), 61 Or.App. 642, 658 P.2d 1180 (1983), *rev. den.*, 294 Or. 792, 662 P.2d 728.

Shortly after the Oregon Supreme Court denied review of Marquam's appeal, it filed bankruptcy. Marquam claimed its assets, which consisted almost solely of real property, were worth only about $107,000, and Erwin & Erwin filed a general claim for services for attorney's fees of $120,000. Lod., pp. 5-7. Most, if not all of this, involved defending the Brewer claim and representing Marquam in various related cases. Lod., pp. 8-9. This claim did change over time. Lod., pp. 10-11.

Brewer objected to this claim contending that Erwin & Erwin fabricated it for purposes of the bankruptcy to prevent her from collecting her punitive damage award. There were no written documents of any type to support this claim. There were no bills, no corporate minutes discussing how to pay for these services, no accounts payable and no payments. Tr. 86-87 (4-2-85). Furthermore, the only way Marquam could pay for these services was to liquidate its assets. Lavelle Mullennex testified that her investment in Marquam was her retirement, thus limiting the option of liquidation to pay Erwin & Erwin's fees. Tr. 52-53, 80-81 (5-6-85).

Erwin & Erwin, P. C. consists of two lawyers, Warde H. Erwin and his son, Charles Erwin. Together with Lavelle Mullennex, they constituted the entire board of directors of Marquam Investment Corporation in May, 1983. Lod., p. 1.

SUMMARY OF ARGUMENT

The Court of Appeals acted within its discretion in finding that Erwin & Erwin's appeal was frivolous. Erwin & Erwin's claim for fees had no reasonable basis in the Bankruptcy Court, much less in the Ninth Circuit. It was a classic insider's claim which the Bankruptcy Court should have vigorously scrutinized. The evidence was overwhelming that the claim was a fabrication by Erwin & Erwin to try to thwart Brewer from collecting her judgment. The Bankruptcy Court had no basis to allow this, and the United States District Court was correct in dismissing it. Erwin & Erwin had no reasonable basis to appeal this case to the Ninth Circuit, and that Court acted within its discretion in imposing a sanction on Erwin & Erwin.

ARGUMENT

The imposition of sanctions was within the Ninth Circuit's discretionary powers. The Ninth Circuit decided two underlying issues which disposed of this case on the merits. It held first that the Erwin & Erwin claim was an insider claim for services, and this Court requires rigorous scrutiny of it pursuant to *Pepper v. Litton*, 308 U.S.

295, 306 (1939). The Bankruptcy Court did not do this, it held that the Erwin & Erwin claim was not an insider claim, and it did not place the burden of proof to justify this claim on Erwin & Erwin. A.1. The Ninth Circuit correctly decided that this decision had no basis in fact or law. *Brewer v. Erwin & Erwin*, 942 F.2d 1462 (9th Cir. 1991).

Secondly, the Ninth Circuit agreed with the District Court that the evidence against this claim, namely, the lack of any records to support it, made it so implausible on its face that no reasonable factfinder could credit it. It held that the Bankruptcy Court's finding that Charles Erwin did not intend to donate his services was clearly erroneous. *Brewer v. Erwin & Erwin, supra*. This opinion is overwhelmingly correct, and there is no reason for this Court to review it.

The Ninth Circuit imposed sanctions because the claim of Erwin and Erwin was so absurd and implausible that it should not have appealed its denial to that court. Both the law and the facts should have convinced Erwin & Erwin long ago not to have pursued this claim. The fact that the Bankruptcy Court initially allowed the claim did not give it a reasonable basis in fact or law. Once the District Court correctly exposed the extreme invalidity of Erwin & Erwin's claim, they should not have wasted further time pursuing it to the Ninth Circuit.

This case does not present any unique issues for this Court. The Ninth Circuit realized this case deviated so far from an accepted legal and factual basis that it justified sanctions for a frivolous appeal. This does not mean that

most appeals to reinstate a bankruptcy court's decision may be in this category. This case was unusual because the Erwin claim had no basis whatsoever and the Bankruptcy Court ignored established law and the facts in its decision.

This Court should leave the imposition of sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure to the Circuit Courts' discretion to decide on a case-by-case basis as the Ninth Circuit did in this case. It should not impose any inflexible rules to control their discretion.

Erwin & Erwin ask this Court to vacate the Ninth Circuit opinion which affirmed the District Court's denial of their attorney's fee claim. This Court does not have jurisdiction to review this. The Ninth Circuit issued its judgment on August 26, 1991. A. 38. Erwin & Erwin did not request a rehearing from that decision, and its petition for certiorari is untimely. Rule 13.4 of the Rules of the Supreme Court.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

CHARLES ROBINOWITZ
Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re MARQUAM INVESTMENT CORP., Debtor.	Civil No. 88-0915-PA Bankruptcy No. 383-01488-H11
SUSAN BREWER, Objector/Appellant, v. ERWIN & ERWIN, P.C., Creditor/Respondent.	**OPINION** (Filed March 8, 1990)

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REDDEN, J.

Suzan Brewer (Brewer) appeals the bankruptcy court's orders allowing the unsecured claim of Erwin & Erwin, P.C. (Erwin & Erwin), for $120,000 attorney's fees, against debtor Marquam Investment Corp. (Marquam). I reverse the bankruptcy court and remand for entry of an order disallowing Erwin & Erwin's claim in its entirety.

BANKRUPTCY

I. Procedural Background

This dispute over Erwin & Erwin's claim for attorney's fees is the most recent skirmish in a war between Brewer and Marquam, Brewer's former landlord, that began in 1976. *See, e.g., Brewer v. Erwin*, 287 Or. 435, 437 & n.1, 600 P.2d 398 (1979) (*Brewer I*) ("[t]he present appeal is one phase of a landlord-tenant dispute to which the parties have devoted an extraordinary amount of their time and efforts"); *Brewer v. Erwin*, 61 Or. App. 642, 644, 658 P.2d 1180 (*Brewer II*) ("This ought to be the final round in a protracted course of litigation between these parties who once, though it seems unbelievable now, enjoyed an amicable landlord-tenant relationship."), *review denied*, 294 Or. 792, 662 P.2d 728 (1983). In 1980, Brewer won a $97,880 state court judgment against Marquam on tort and statutory claims. The judgment became final in 1983, and Marquam petitioned for bankruptcy shortly thereafter.

Brewer filed an unsecured claim for $75,000 in punitive damages against Marquam's estate. Erwin & Erwin filed an unsecured claim for $120,000 in attorney's fees. In 1988, the bankruptcy court confirmed Marquam's chapter 11 plan, allowing Erwin & Erwin's claim and effectively obliterating Brewer's claim for punitive damages. Brewer appeals the allowance of Erwin & Erwin's claim.

II. The Brewer-Marquam Tort Litigation

Warde Erwin, Marquam's president, owns about 60% of Marquam's stock. LaVelle Mullennex, Warde Erwin's legal secretary for more than twenty years, owns the remaining 40% of Marquam. Warde Erwin and his son, Charles Erwin, are attorneys and shareholders in the professional corporation of Erwin & Erwin. (Although the professional corporation was formerly known as Erwin, Lamb & Erwin, I will refer to it throughout this opinion as Erwin & Erwin.) When Marquam filed its chapter 11 petition in 1983, it listed Charles Erwin as a director and vice president of Marquam, although he apparently is no longer a Marquam officer. Charles Erwin was responsible for most of the legal services included in Erwin & Erwin's claim. Lawrence Erwin, another son of Warde Erwin, represents Marquam in the bankruptcy proceedings.

Brewer rented the second story of an old house from Marquam. In about 1975, Marquam decided to demolish the house. Marquam sent Brewer an eviction notice, but Brewer was reluctant to leave. "She became interested in a group which sought to prevent the demolition of old houses in the neighborhood and attended one or two of the group's meetings." *Brewer I*, 287 Or. at 437.

When Brewer did not leave voluntarily, Mullennex and Warde Erwin became impatient. They repeatedly threatened, menaced, and harassed Brewer and her friends. *See id.*, 287 Or. at 458-60. Marquam partially demolished the lower floor of the house while Brewer was still a tenant. There was evidence that Warde Erwin struck Brewer in the face. *Id.* at 459; *Brewer II*, 61 Or. App. at 645.

At trial in September 1977, the court granted motions for involuntary nonsuit and for directed verdicts on Brewer's claims for intentional infliction of emotional distress. Erwin & Erwin represented Marquam. Brewer won $650 general damages on her battery claim against Warde Erwin and Marquam.

On September 25, 1979, the Oregon Supreme Court reversed the trial court's dismissals of Brewer's intentional infliction of emotional distress claims and remanded for a new trial. *Brewer I.* In March 1980, the second trial ended in mistrial. At the third trial in June 1980, the jury found that Marquam, Mullennex, and Warde Erwin had intentionally inflicted severe emotional distress on Brewer. *Brewer II.* Brewer was awarded $20,000 general damages against Warde Erwin, Mullennex, and Marquam; $75,000 punitive damages against Marquam only; $2,880 for violation of the Oregon Residential Landlord and Tenant Act, ORS 91.700-.895; and attorney's fees. *Id.*

On February 16, 1983, the Oregon Court of Appeals reversed the trial court's grant of a new trial and remanded for reinstatement of the jury verdict against Warde Erwin, Mullennex, and Marquam. *Brewer II,* 61 Or. App. 642. On April 26, 1983, the Oregon Supreme Court denied Marquam's petition for review. 294 Or. 792. On May 4, 1983, Marquam filed for bankruptcy.

III. Bankruptcy Proceedings

Marquam's bankruptcy petition valued its total assets at $107,152.54. Marquam listed a $120,000

unsecured debt to Erwin & Erwin "[f]or attorneys' fees rendered staring [sic] in April of 1976 to date for defense and services in various lawsuits entailed in representation of Marquam." Appellant's E.R. at 5.

On May 6, 1985, the bankruptcy court completed hearings on whether Erwin & Erwin intended that its legal work be compensated by Marquam. The court stated that

> neither Charles Erwin nor Mr. Lamb, who are members of the professional corporation, were not stockholders or officers of Marquam and therefore would not derive any benefit from any increase in the assets held by Marquam. The fact that Mr. Erwin spent a great deal of his time over a period of several years devoted to the legal problems of Marquam doesn't seem reasonable to the Court that Mr. Erwin would do that – would merely contribute his services without compensation when he is not – has no relationship or no ownership interest in Marquam.
>
> Mr. Erwin testified that during a part of that period his income was so low that he was required to borrow funds. That doesn't seem to indicate that – he wouldn't be donating services to a corporation in which he had no financial interest.

Appellant's E.R. at 20-21. The court also stated that

> it appears that there would have been no good purpose served, necessarily, in the professional corporation submitting a bill to Marquam when it was known that Marquam had no funds from which those services could be paid, and submitting such a bill would have just been an effort in

> futility. Whether or not the attorney fees were mentioned or an account for attorney fees were mentioned in those two lawsuits were a matter of tactical trial tactics and not necessarily evidence that there was no such agreement that the legal services would be compensated.

Id. 21. The court was

> convinced that the evidence shows that the services performed by the professional corporation were not intended to be donated to Marquam but were intended that they would be paid by Marquam when funds were available by Marquam to make payment of those fees, and, therefore, the Court finds that the claim for attorney fees is a valid claim, and the only question then remaining is whether or not the doctrine of equitable subordination will apply to the claim and whether or not the amount of the claim is reasonable.

Id. at 22-23.

On March 25, 1988, the bankruptcy court confirmed Marquam's chapter 11 plan. *Id.* at 88. The court allowed Erwin & Erwin's claim for $120,000 attorney's fees.

IV. Marquam's Attempts to Evade Brewer's Claim

Two courts have found that Marquam improperly attempted to evade Brewer's claim against it.

A. Marquam's Transfer to Squaw Creek

Under a joint venture agreement executed May 9, 1980, the Warde H. Erwin Trust (Trust) and Paul Martin,

an architect, agreed to build and sell condominiums on Marquam's vacant lots. The ill-fated development was to be called Inner City Village. The Trust agreement, which was not recorded, apparently established Lawrence Erwin, Charles Erwin, and LaVelle Mullennex as trustees.

On June 20, 1980, the jury returned its verdict for Brewer against Marquam. On June 23, 1980, Marquam transferred its vacant lots to Squaw Creek Construction Co. (Squaw Creek), a corporation owned by Warde Erwin that had no other assets. In return, Marquam received a promise that Squaw Creek would pay for the land if and when Inner City Village was built and sold. If the condominiums were not built, Marquam would get the land back in two or three years.

Although Squaw Creek was to pay Marquam for the vacant lots, the joint venture agreement provided that the Trust, not Squaw Creek, would be paid for the vacant lots from the proceeds of condominium sales. The joint venture agreement did not require that the Trust pay Squaw Creek for the vacant lots, although it did provide that Squaw Creek would transfer the vacant lots to the joint venture when needed for development.

In August 1980, the Portland Historical Landmark Commission approved the joint venture's plans for Inner City Village, subject to seven conditions. Warde Erwin objected to those conditions. On September 4, 1980, the Portland City Council denied Warde Erwin's appeal. There is no evidence that the plans for Inner City Village were revised to meet the Landmark Commission's seven conditions.

Mullennex and Charles Erwin testified at trial that several banks made oral commitments to finance Inner City Village. 2 Respondent's E.R. at 96, 103. These alleged oral commitments were never consummated. In early 1982, Martin sought financing. On January 28, 1982, a bank offered to lend money to the joint venture at 21% percent interest. This attractive offer expired on February 24, 1982.

In January 1982, Brewer filed an action in Multnomah County Circuit Court claiming that Marquam had fraudulently transferred its vacant lots to Squaw Creek. At the trial, Marquam contended that the equity in its office building could satisfy Brewer's possible judgment against it. Charles Erwin, Marquam's attorney, did not inform the court that the office building was encumbered by the long-term lease to Erwin & Erwin, or that Erwin & Erwin had an outstanding claim against Marquam for attorney's fees.

The Multnomah County Circuit Court set aside the transfer. It stated:

> Here you have evidence that the assets left in Marquam amount to some one hundred and sixteen thousand eight hundred, if I understand it correctly, and that's offset somewhat by a mortgage that exists, which would bring it down somewhere near $100,000.
>
> [I]t clearly appears that potentially [Brewer's] claim could be in excess of the assets Marquam has left. . . .

Appellant's E.R. at 63-64 (transcript of April 12, 1982 hearing). The court found that Marquam originally intended to develop Inner City Village, and that the

transfer to Squaw Creek was tacked on later to avoid Brewer's claims. The court rejected Charles Erwin's explanation for the transfer: "I think that explanation is more of an afterthought in justifying what was done rather than the reason for what was done." *Id.* at 66. The court concluded that Marquam intended to hinder and delay Brewer, although the court "avoid[ed] using the word 'defrauding' " regarding Marquam's conduct. *Id.* Marquam did not appeal.

B. The Lease Between Marquam and Erwin & Erwin

In 1979, Marquam renewed its lease agreement with Erwin & Erwin. The lease provided that Erwin & Erwin would pay $750 per month rent for 3,202 square feet of office space and a storage basement. The lease required that Erwin & Erwin pay utilities, liability insurance, and maintenance, while Marquam would pay property taxes and fire insurance.

During the bankruptcy proceedings, Brewer and the trustee challenged the lease, arguing that it was a fraud on Marquam's creditors. The bankruptcy court found that the trustee had not met its initial burden of showing badges of fraud. On appeal, Judge Malcolm F. Marsh reversed, concluding that the lease was a fraudulent transfer. *John B. Franzwa, Inc. v. Erwin & Erwin, P.C. (In re Marquam Investment Corp.)*, No. 88-114-MA, slip op. at 2 (D. Or. June 13, 1988), *quoted in* Appellant's E.R. at 76-87.

Judge Marsh found that the lease agreement between Marquam and Erwin & Erwin bore many badges of fraud. Marquam executed the lease in anticipation of its continued litigation against Brewer. The lease left Marquam

insolvent by encumbering its office building, the only remaining valuable asset after the transfer of the vacant lots to Squaw Creek. Neither party to the lease agreement bothered to observe its terms. Erwin & Erwin paid fire insurance premiums and taxes while Marquam paid for utilities. The parties failed to disclose the lease during the Squaw Creek litigation.

Erwin & Erwin paid rent at less than half the market value. Judge Marsh found that "[t]he relationship of [Marquam and Erwin & Erwin] is so close and intertwined that the transaction was clearly not at arm's length." Appellant's E.R. at 83.

STANDARD OF REVIEW

I. District Court Review

The district court acts as an appellate court when it reviews a bankruptcy court judgment. *Daniels-Head & Assoc. v. William M. Mercer, Inc. (In re Daniels-Head & Assoc.)*, 819 F.2d 914, 918 (9th Cir. 1987). The district court reviews findings of fact for clear error and reviews conclusions of law de novo. *Id.*

A finding is "clearly erroneous" when the reviewing court on the entire evidence is "left with the definite and firm conviction that a mistake has been committed," even though there is evidence to support the finding. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Even when the trial court's findings are based on the credibility of witnesses, the reviewing court may find clear error because demeanor and inflection are not the only factors that affect the decision to believe a witness.

Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985). "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Id.*

II. Statutory Standard and Burden of Proof

The court should disallow a claim by "an insider or attorney of the debtor" to the extent that the claim "exceeds the reasonable value of such services." 11 U.S.C. § 502(b)(4) Section 502(b)(4) was intended to prevent "overreaching by the debtor's attorneys and concealing of assets by debtors." S. Rep. No. 95-989, 95th Cong. 2d Sess. 68, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5849.

The insider or attorney creditor must adequately support a claim against the debtor's estate. *In re All-American Auxiliary Ass'n*, 95 Bankr. 540, 545 (Bankr. S.D. Ohio 1989). If the insider or attorney creditor is able to support the claim, the objecting party must point to facts tending to defeat the claim. *Id.* If the objector does introduce such facts, the creditor must prove the validity of the claim by a preponderance of the evidence. *Id.*

Erwin & Erwin argues that Brewer must show by clear and convincing evidence that Erwin & Erwin intended to donate legal services to Marquam. Assuming that Erwin & Erwin has adequately documented its claim, Brewer has successfully cast doubt on Erwin & Erwin's claim. The burden shifts to Erwin & Erwin. *See All-American Auxiliary*, 95 Bankr. at 545. Gift law is irrelevant.

DISCUSSION

I must reverse the orders allowing Erwin & Erwin's claim for attorney's fees. Erwin & Erwin did not adequately support its claim. Even if it had, Erwin & Erwin did not show the validity of its claim by a preponderance of the evidence.

The bankruptcy court's rulings are certainly understandable because of the protracted hearings on this claim and the acrimonious and unhelpful presentation by the attorneys. Although the bankruptcy court held evidentiary hearings in 1985, it did not have the opportunity to consider later developments, such as Erwin & Erwin's withdrawal of its allegation that Marquam paid fees through a rental set-off. In addition, this case seems to have become a personal feud among counsel and parties. In the briefs before this court, neither attorney cited the relevant legal standards. Erwin & Erwin focused on Oregon gift law while Brewer cited decisions on equitable subordination.

I. Erwin & Erwin Is an Insider

Erwin & Erwin argues "[t]here are no claims of 'insiders.' " Respondent's Brief at 12. I disagree.

Under the Bankruptcy Code, an "insider" includes a "relative of a . . . director, officer or person in control of the debtor." 11 U.S.C. § 101(30)(B)(vi). However, I need not resort to the Bankruptcy Code to realize that both current shareholders in Erwin & Erwin are insiders of Marquam. Warde Erwin is Marquam's president, and Charles Erwin is Warde Erwin's son. Marquam's 1983

bankruptcy petition lists Charles Erwin as Marquam's vice-president and director. *See* Appellant's E.R. at 4. Marquam's secretary and 40% shareholder, LaVelle Mullennex, has been Erwin & Erwin's legal secretary for many years.

Erwin's direct examination of Mullennex at trial on this claim revealed Erwin & Erwin's entanglement with Marquam:

> Q: Tell the Judge how it is – what mechanics you would go through to send the bill [for legal services] to Marquam.
>
> A: From Erwin & Erwin?
>
> Q: Yes, ma'am.
>
> A: Well, I suppose I would sit down and add up the timesheets for some particular time and then type that out and probably hand it to somebody or put it in a file. . . . I did not do that.
>
> Q: You mean you would have to type up a bill and present it to yourself?
>
> A: That's correct.
>
> Q: [D]id it ever occur to you to send yourself a bill?
>
> A: No, unfortunately probably it didn't.

2 Respondent's E.R. at 54-55. Charles Erwin apparently elicited this testimony to show that it would have been pointless for Erwin & Erwin to send a bill to Marquam for legal fees. However, Mullennex's testimony shows that Marquam and Erwin & Erwin are so intertwined that they cannot be considered separate entities.

II. Erwin & Erwin's Claim

A. The Rental Set-Off

Erwin & Erwin originally claimed that it collected attorney's fees from Marquam through a monthly rent set-off of $184.22 starting in 1976, for a total of $15,658.70. Charles Erwin testified that the setoff was "the only compensation this law firm – me – received during this time."

2 Respondent's E.R. at 106. he also testified that "I received some compensation in the form of rental, but only to the extent of $184 a month." *Id.* at 107.

The set-off has no basis in reality. Erwin & Erwin had never billed Marquam for the set-off and Marquam never listed it as a monthly expense. In fact, Erwin & Erwin was making Marquam's monthly mortgage payments and claiming the difference between the mortgage and rent payments as a set-off. In Erwin & Erwin's revised 1986 claim, the $15,658.70 attorney's fees set-off disappeared. It reappeared as a $13,056.73 set-off for utility bills that Erwin & Erwin had paid.

The set-off episode shows that Erwin & Erwin's claim was at best an afterthought. Charles Erwin has not explained the set-off's magical transformation from attorney's fees to utility bills.

B. Services for Inner City Village

The set-off is not the only example of Erwin & Erwin's flexible fee claim. In 1983, the claim included

$34,400 in attorney's fees for "[p]reparation of all documents for unit ownership development [i.e., Inner City Village], associated hearings and conferences, design review – City Council." To support this claim, Charles Erwin testified as follows:

> Q: Can we agree that the work on the condominium project was going to be free; that there were no legal fees going to be incurred on that?
>
> A: No, we cannot agree to any such nonsense.

2 Respondent's E.R. at 132.

Despite Charles Erwin testimony, the joint venture agreement provided that Erwin & Erwin's services "are to be noncompensated professional services and shall be considered as and when made a noncompensated contribution to the joint venture." Appellant's E.R. at 106. In 1986, Erwin & Erwin dropped its claim for legal work on the Inner City Village project.

C. Erwin & Erwin's Failure to Bill Marquam

Erwin & Erwin never billed Marquam for legal fees. The parties presented expert testimony on this issue. Richard Solomon, plaintiff's accounting expert, testified that Erwin & Erwin should have sent regular itemized bills to Marquam to show that the parties' transactions were at arms-length.

1 Respondent's E.R. at 194-98.

According to Erwin & Erwin, its expert, Roy Griffin, testified " '[t]hat his experience, in similar client professional relationships, is that billings are sent at the conclusion of lengthy jobs.' " Respondent's Brief at 7. Despite

Erwin & Erwin's quotation marks, the statement is not verbatim and in fact distorts Griffin's testimony. Griffin testified that "when a person performs a service, somewhere along the line he sends progress billings, or waits until the project is completed and sends a billing for the amount of his services; that's normal procedure." 2 Respondent's E.R. at 219. When asked about insolvent clients, Griffin stated "[n]ormally I would expect billings to be done, but it would not be unusual in situations where there are no funds available that the billing might be held up and delayed until funds were available." *Id.*

According to Griffin, Erwin & Erwin should have billed Marquam either periodically or at the completion of a project. Erwin & Erwin did neither. By 1980, Erwin & Erwin had completed projects on which it had logged hundreds of billable hours. Erwin & Erwin sent no bills on any completed projects.

Griffin did testify that a service provider might delay billing an insolvent client until funds were available. However, Erwin & Erwin did not just delay billing, it never billed. If Marquam was insolvent, then it is hard to understand why Erwin & Erwin continued to represent it for so many years.

Erwin & Erwin cites Mullennex's testimony that legal fees were

> probably discussed every other day or so . . . because we meet and have coffee in the morning, and when this litigation was going on there was so much to do every day that everybody was beginning to get a little upset about the fact that it was taking so much time, and

> how were we going to be paying the Erwin & Erwin bills.

2 Respondent's E.R. at 79. Such testimony shows only the incestuous relationship between Marquam and Erwin & Erwin. It does not show that Erwin & Erwin expected to be paid for its legal services.

D. Erwin & Erwin's Time Records

Despite its failure to bill Marquam, Erwin & Erwin asserts that "this claimant kept regular time records contemporaneously with all work performed, not just some of it." Respondent's Brief at 14. Erwin & Erwin may have kept regular time records for all the work it performed. However, its claim does not reflect such records. In its 1983 claim, Erwin & Erwin cited no time slips. In its amended 1986 claim, it cited time slips, but they did not account for all the hours claimed.

For example, in the 1982 action to set aside the Squaw Valley transfer, Erwin & Erwin's time slips account for 19.75 hours, while Erwin & Erwin's reconstruction of time spent is 70 hours. *Id.* at 11. In one landlord-tenant action, Erwin & Erwin's time slips account for 179.25 hours, while Erwin & Erwin's reconstruction of time spent is 445.25 hours. *Id.* In another case, Erwin & Erwin originally estimated 50 hours, reconstructed 20 hours, and cited no time slips at all.

In another example of Erwin & Erwin's flexible attorney's fees, in 1983 Marquam brought action against Aetna Insurance Co. (Aetna), claiming that it had incurred $120,000 in legal fees during its tort litigation against Brewer. (Marquam claimed that Aetna refused to settle

even though Brewer would have accepted $7,500.) Appellant's E.R. at 72. However, in its 1983 petition, Erwin & Erwin claimed about $25,600 for the same services.

Erwin & Erwin had reasons for keeping time slips other than collecting fees from Marquam. In Marquam's many landlord-tenant actions, Marquam hoped to extract attorney's fees from its tenants if it prevailed.

E. Failure to Disclose the Claim for Attorney's Fees

Marquam did not disclose Erwin & Erwin's claim for legal fees during the 1980 trial on Brewer's emotional distress claim, or the 1982 trial on the Squaw Creek transfer. Mullennex explained that Marquam did not report its liability to Erwin & Erwin because Marquam is a cash-basis taxpayer.

2 Respondent's E.R. at 93.

The claim for attorney's fees was relevant in both cases in which Marquam failed to disclose it. In the Brewer tort claim trial, Erwin & Erwin's claim for attorney's fees would have reduced Marquam's net worth, diminishing its potential liability for punitive damages.

In the Squaw Creek transfer litigation, the claim for attorney's fees would have further discredited Marquam's argument that it had sufficient assets to pay Brewer's judgment against it. Charles Erwin now states that he did not disclose the fees because "[n]o stipulation was sought nor received, nor did Brewer inquire on the subject of creditors other than herself." That explanation does not seem adequate, because Marquam's net worth was one of the key issues in the case. If Erwin & Erwin's

claim was bona fide, it should have been disclosed to the court.

Erwin & Erwin argues that it did disclose its claim several times. However, Erwin & Erwin's claims for attorney's fees against Marquam seem to have surfaced when the fees would be paid by a third party. Erwin & Erwin also argues that Brewer was aware of the claim and could have brought it up in the two actions. Brewer is not responsible for raising a claim whose full extent was known only to Erwin & Erwin and Marquam.

F. Erwin & Erwin's Profit Motive

Erwin & Erwin argues that it never intended to donate its legal work to Marquam without pay. Charles Erwin asserts that he "had to borrow significant funds just to pay bills." Respondent's Brief at 11. He states that his income between 1978 and 1982 ranged from $15,000 to $31,000. Even if these allegations were documented, they would not show that Erwin & Erwin intended to collect fees from Marquam.

This argument is similar to one rejected by the court in *All-American Auxiliary*, 95 Bankr. 540 (Bankr. S.D. Ohio 1989), where the claimant sought unpaid salary from the debtor. That claimant had no documentation of his claim. Erwin & Erwin's claim should also be rejected as without documentation.

Erwin & Erwin has donated services to Marquam. It claims no fees for representing Marquam in *Marquam Inv. Corp. v. Beers*, 47 Or. App. 711, 731, 615 P.2d 1064, *review denied*, 290 Or. 249 (1980). In at least two other cases,

Erwin & Erwin claimed no fees for representing Marquam. *See Brewer I*, 287 Or. at 437 n.1 (citing *Marquam Inv. Corp. v. Casciato*, No. 77-370 (D. Or. Aug. 10, 1977); *Marquam Inv. Corp. v. Bonyhadi*, No. A7803-03571 (Multnomah County Circuit Court)).

Erwin & Erwin also argues that Charles Lamb would not have donated his time to Marquam. However, no documents show an agreement between Lamb and Erwin & Erwin regarding Lamb's compensation after leaving Erwin & Erwin.

G. The Inner City Village Project

Erwin & Erwin contends it expected that Marquam would pay it from the proceeds from the Inner City Village condominium project. Although this once was a realistic expectation, Marquam's transfer to Squaw Creek in 1980 made payment from this source unlikely.

Marquam transferred its vacant lots to Squaw Creek in return for a promise that Squaw Creek would pay Marquam for the land when and if the condominiums sold. If the condominiums were not built, the land could be tied up for two to three years before Marquam could recover it. During those years, a creditor of Squaw Valley could levy against the property and cut off Marquam's rights.

In addition, the Trust and Martin could agree between themselves to reduce the price paid for Marquam's land without consulting Marquam. Even if Marquam were paid for the land, it would receive at most

$150,000, only $30,000 more than the attorney's fees supposedly due Erwin & Erwin. To collect its fees, Erwin & Erwin would have been required to render its client insolvent.

Erwin & Erwin now contends that "Marquam retained improved and [sic] realty and land of a value equivilent [sic] to pay its creditors, in addition to the land which it committed to the development project." Respondent's Brief at 9. This assertion directly contradicts the Multnomah County Circuit Court's finding that "the assets that are left with Marquam are inadequate." Appellant's E.R. at 65. Erwin & Erwin could have disputed the court's findings on direct appeal. It is too late to do so now.

CONCLUSION

The bankruptcy court's orders allowing Erwin & Erwin's claim for attorney's fees are reversed. The case is remanded to the bankruptcy court for the entry of an order disallowing Erwin & Erwin's claim for attorney's fees in its entirety.

DATED this 8 day of March, 1990.

/s/ James A. Redden
JAMES A. REDDEN
United States
District Judge